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ACTS OF CONGRESS HELD UNCONSTITUTIONAL BY A BARE MAJORITY OF THE SUPREME COURT.

Within the last two years the Supreme Court has held not a few acts of Congress unconstitutional by the bare majority of five to four. So frequent has this become as very seriously to endanger the strong confidence in which this court is held by the people. It hardly seems possible that on so many questions of importance there should be such a wide disagreement among the members of such a tribunal and the frequency of such sharp disagreements tends to suggest that something more than the mere colorless questions of legal construction are present, that the judges are swayed to some extent by previous fixed opinions on certain questions of legislative policy from which they cannot entirely divorce themselves and which lead them, unconsciously to conclusions with which they are strongly in sympathy.

That such preconceived views especially on questions of a political nature or of administrative policy may not endanger national legislation of a kind strongly favored by the people, it is well to keep constantly before us the admirable suggestions contained in Judge Hanford's paper, read before the American Bar Association on the "Increased Responsibilities of Our National Judiciary" in which he called attention to the number of constitutional questions decided by a majority of one. He suggested as a remedy for this condition, and to counteract the lack of confidence which such decisions necessarily entail, that the number of judges be increased to fifteen and that nine justices be required to concur in holding any legislation, national or state, to be unconstitutional.

Judge Hanford's scheme has been criticised on the ground that such questions not arising abstractly but as necessary incidents in trials *inter partes*, such judgments might be reversed or affirmed by a minority of the court which would not at all be satisfactory. However, whatever may be the views of the bar in regard to Judge Hanford's suggestions, it seems to us that at least the number of judges of the Supreme Court should be increased and some qualifications imposed on the appointing power so that men shall not be selected from executive government employment or while in active participation in political affairs for appointment to the Supreme Bench. To our mind, while there are many good lawyers in the executive and legislative branches of government, such lawyers do not make the best candidates for the judiciary. This is due mainly to the preconceived notions they entertain toward certain political policies and their strongly partisan attitude which they have been accustomed to take to every question of law submitted for their consideration. Surely, the best training for a judge of the Supreme Court is a long previous experience on the bench and therefore, it seems to us selections for this bench should be limited to this class of men, who as a general rule will regard questions of law more evenly and with less pernicious partizanship and reach more unanimous agreement on the important questions which come before the Supreme Court for decision.

BASEBALL, NOT A "GAME" BUT A NATIONAL RECREATION.

The great national game of baseball, which makes the small boy forget his devilment and the dignified jurist his problems, has now been judicially recognized as one of the essentials of our civilization and not as a game of chance.

This epoch-making decision is by the Supreme Court of Kansas in the recent case of State v. Prather, 100 Pac. 57. In that case a statute of Kansas provided punishment for "horse racing, cockfighting, or playing at cards or game of any kind on the first day of the week, commonly called Sunday." Prather was charged with playing baseball on Sunday, and convicted of an offense under this statute. The court held that the word "game" as used in the statute, should be construed only to include sports of a similar character to those specifically enumerated, and should therefore be held to exclude baseball.

Then, the court gives to the game this remarkable judicial endorsement. "Until very recently," the court said, "there has

been more or less controversy as to the early history and origin of baseball; some contending that it is only a modified form of the English game of 'rounders.' In order to settle the dispute, a special baseball commission was appointed, consisting of a number of eminent men. Their report was published in 1907, and the commission after full investigation unanimously decided that baseball is distinctively an American game; that it originated in Cooperstown, N. Y., in 1839, and that the first scheme for playing it was the invention of Gen. Abner Doubleday, who afterwards graduated at West Point, and achieved honorable distinction in the Civil War. The rules of the game as first published by the Knickerbocker Club of New York in 1845 differ only in a few minor details from those of the modern game. Baseball was first played by regular clubs in 1845, and, while it had begun to attract attention in the 'fifties,' it did not become a common form of sport or exercise, and was not generally played, until 1865. The first professional club was organized for playing it in 1868. Report of special baseball commission, Spalding's Official Baseball Guide for March, 1908; Enc. Britannica (9th Ed.) subject 'Baseball'; Century Magazine, vol. 74, pp. 307-319. Horse racing and cockfighting, two of the games or sports specifically mentioned, are recognized everywhere as immoral in their tendency, and are generally accompanied by gambling and rowdyism; and the most common form of gambling is by card playing. The particular words of the statute create a class or species of games which in the popular mind are associated with gambling. Baseball, on the other hand, is looked upon as entirely devoid of this and like objectionable features. It is not in any sense a gambler's game. The youth of the land are encouraged by teachers and parents to become proficient in it as an athletic sport, healthful to mind and body. Its popularity, however, is due largely to the fact that it is spectacular, and brings more enjoyment to those who witness it than to the players themselves. This and its freedom from all immoral tendencies have made it the acknowledged national sport, a game the popular interest in which continues unvarying, leveling all class distinctions."

NOTES OF IMPORTANT DECISIONS.

INJUNCTION—ENFORCING RIGHTS RESULTING IN UNEQUAL INJURY TO DEFENDANT.—While it is true that there is no right without a remedy, it is also true that no person can always demand any particular remedy to enforce any particular right violated. Metaphysicians and scholastic legalists who are always scoffing at the law's lack of logic cannot perceive the wonderful symmetry of the law, a symmetry of justice if not of logic. Mathematic certainty is only possible to sciences dealing with inorganic matter or abstract theories, but is wholly out of place when regulating the conduct of beings whose actions are not controlled by fixed laws but whose very whims and caprices, on the other hand, can upset the most beautiful scheme of conduct that may be set for them or the nation of which they are a part.

Such considerations must always be kept in mind when balancing the rights of two litigants. It is very seldom the case, as some superficial people imagine, that one party to a lawsuit is wholly right and the other wholly wrong. If that were the case judges would not wrestle ofttimes through the night into the morning hours over a decision in a case before them. These mutual rights of each individual which so frequently clash and thus occasion most of the litigation which demands the attention of our courts of justice, must be carefully regarded and neither be permitted to destroy the other. If possible new remedies must be created which will adjust both rights, and where despite the ingenuity of man two rights recognized by law become irreconcilable under certain new conditions then that right must give way, to whatever extent may be necessary, which is inferior in importance or whose subversion would affect the least number of citizens.

This principle of law, which is coming to be applied more frequently as our population becomes denser and more complex, is ably discussed by the U. S. Circuit Court for the district of Montana in the recent important case of Bliss v. Anaconda Mining Co., 167 Fed. 342. In this case an association of farmers desired to compel the defendants to operate their smelters, valued at ten million dollars, in such a way as to avoid damage to their crops from the smoke and arsenic emitted therefrom. The evidence showed that there was no known device by which this damage could be averted and that to comply with the court's order defendant must abandon their smelter, throw thousands of men out of employment, destroy the value of property worth hundreds of mil-

lions of dollars and disturb to a most appreciable degree the entire social and financial life of the commonwealth of Montana.

Here were two rights involved, both of them important, one, the right to farm and to be free from interference from one's neighbor of a character which destroys or tends to destroy one's use of his own property; the other, the right to mine or dig on one's own property in order to secure valuable ores from the bowels of the earth. No doubt if a nuisance were created by one the value of whose business was insignificant compared to the destruction it occasioned, the law would promptly enjoin its continuance. But on the other hand, applying this rule of comparative value to the two rights involved, where the damage occasioned by the nuisance is insignificant compared to the value of the business creating the nuisance then the nuisance will not be enjoined provided that to do so would destroy the great value of defendant's business. Of course, we are not discussing the question of "suitability of neighborhood." But admitting the neighborhood to be the proper one, as far as neighborhoods go, then it becomes a question of comparison between the rights of litigants, before the court can enjoin the continuance of the nuisance. And this was the principle applied by the court in the principal case refusing to grant the injunction as prayed.

The language of the court is instructive. The court said: "Fundamental and inexorable in its equality is the law that no person can have more rights than his neighbor, because fortune has so shaped conditions that the one owns more money or land or chattels than the other; but when there are two citizens, each of whom is engaged in a lawful business, one in mining, the other in farming, and there comes a conflict where neither can enjoy his own property without interfering to some extent with his neighbor in the enjoyment of his, then it is that the problem is presented how to fix the rights of each so as to secure to each the largest measure of liberty possible under all the circumstances of the particular case. Then it is that the court should so frame its decree as to avoid the destruction of the rights of either. In the western states questions of such a nature often arise with respect to the uses of the waters of the streams where placer and quartz miners have to pollute the water to some extent before it flows down to the ranchmen to be used by them in irrigation of the valley below; but the courts have solved them without compelling either to suffer irreparable damage, although in the solution each has to suffer a certain amount of inconvenience and perhaps recurring damage. Equitable arrangements may often be made when we recognize the principle that as a philosophic condition of the complexities of society to some extent men must yield the full enjoyment of certain individual rights."

LEGAL METHODS FOR THE DETECTION OF FORGERIES AND PROOF OF HANDWRITING BY EXPERT TESTIMONY OR OTHER OPINION EVIDENCE.

The commercial relations of men for centuries have been increasing and constantly growing more complex. The application of writing to the relations and business of mankind is multiform, and the detection of forgeries and proof of handwriting are factors of prime importance, both in the domain of general business and in court proceedings. This article is intended to deal with some of the phases of the matter presented by cases in court. The questions upon the subject have presented themselves in the courts at periods so greatly separated and under such varying circumstances that both statute law and court decisions, whether made under statutes or in cases not covered by statutory enactments, have often quite widely departed from the original common-law upon the subject. Uniform rules for dealing with forgeries and proof of handwriting by comparison can now hardly be deduced from the decisions. An intelligent handling of a given case usually calls for thorough knowledge on the part of court and counsel not only of the law governing the reception of evidence to prove the forgery or the genuine writing, but also a considerable knowledge on their part of the scientific means and methods of distinguishing the genuine from the spurious. Ample as the authorities dealing with these questions are, experience has shown that lawyers, and judges as well, are almost universally uninformed in both respects. Court and counsel should be advised:

(1) Of the ordinary rules of evidence—
   (a) As to relevancy;
   (b) As to limitations upon competency of opinions;
   (c) As to extent of admissibility of admissions;
   (d) Qualifications of witness, proper foundations, and preliminary matters;
   (e) Standards of comparison, and

statutory or other legal modifications thereof, as hypotheses;

(f) Extent of cross-examination as to expert and other opinion evidence;

(g) Requiring production of scientific or other means employed in arriving at conclusions;

(h) As to admissibility of secondary evidence when non-production of best or primary evidence excusable;

(i) That all preliminary questions, both as to proper qualification of the witness and competency of proposed proof are exclusively for the court, and not the jury.

(2) Of the means and methods employed by the expert:

(a) Magnifying instrumentalities and artificial light used or available;

(b) Photographic and other means of reproduction;

(c) Drawings, charts and blackboards for demonstration;

(d) Scientific means for detecting forgeries recognized by experts and professionals, such as—

General appearance,
Unconscious habits,
Finger flexure used,
Gripping capacity of writer,
Habitual tendencies,
Individual peculiarities,
Pen scope,
Movement used,
Parallelisms,
Proportioning,
Position of lines relative to edge of paper,
That there is always dissimilarity in genuine signatures and writing by the same person,
Probable change of genuine signature and handwriting of a person by reason of lapse of time,
Pen pressure, and where ink is deposited,
Openings between letters,
Mis-spelled words,
Ragged features,
Similarities,
Spread of letters and tremors,
Constant pivot and radius,
Allignment uniform or uneven,
Kind of ink used,
Age and quality of paper and effect of chemicals thereon,
Effect of erasures,
Actual and relative slant of letters,
Angles between their stems and base,
Connection of letters,
Eccentricities of letters,
Extension of extremities,
Inclination of letters relative to vertical lines,
Resemblances or differences,
Sharpness of curves, size, slant, shade, space, shape,
Serrations or edges of lines,
Inflection, marking, crossing or dotting of letters, and use of punctuation,
Capitalization and manner thereof.

(e) What forged signatures show on examination:

General sameness, pictorial resemblance only, omission of shades, pauses in lines, absence of pen-pressure, copying effect, hesitancy and breaks, studied appearance — greater length than original.

(f) Features of tracing process:

Absence of evidence of pen pressure, or effect of split points,
Evidence of hesitancy in movement.
Resemblance in outline of signature, but peculiar sameness throughout all lines, giving lifeless appearance,
Absence of free, flowing, lifelike style.

Emphasis should be laid on the fact that the means and methods of the handwriting expert in detecting forgeries or proving genuine writings are not, as commonly sup-

posed, particularly complex, abstruse or highly technical, nor is the equipped expert necessarily a person of extraordinary endowments or a specially gifted genius. On the contrary, handwriting experts are those who, by giving study and careful attention to details, within the common knowledge and reach of everyone, have so familiarized themselves with the above listed and other peculiarities and features as to approach a scientific proficiency and skill with regard thereto. He simply notices what others might but through habitual carelessness, do not, detect. There are features of individual handwriting which are almost, if not altogether, as peculiar to it as to the face of the individual writer are its features and expressions. If men were as observant of writing as they are of faces, forged and disguised writings would very seldom deceive any of them. The expert knows writing in much the same way as ordinary men do faces, except that the methods of comparison used and examinations made by him have been perfected, classified and systematized so that his knowledge has become scientific and his means and methods an art.

An expert should not be called into a case without opportunity for previous preparation and examination and treatment of the subject of his testimony. His offhand evidence would not be more than a mere expression of his opinion, which would have little or no greater probative value than such an opinion of any other person, (whose proffered testimony of this character would, of course, be rejected). While the expert has trained his faculties to detect numerous details and characteristics readily, which probably would not be noticed by an ordinary witness, yet he should not be expected to draw an important conclusion hurriedly, without opportunity to call into play his art or science. The conclusion does not come to him by any supernatural inspiration, but must be the result of painstaking work and the application of knowledge and tests proved by experience.

Mr. Jay F. Shearman, of Wichita, Kansas, (clerk of the U. S. circuit and district courts), one of the most proficient of handwriting experts in the west, makes it a rule to require time for this kind of preparation and previous examination of the writings. If at any time he is called hurriedly into a case to testify offhand, he will always preface his testimony by the statement that his opinion so given is of little or no value. Mr. Shearman has been employed as an expert on writings and as an expert witness in a great many cases in different parts of the United States, both in the federal and state courts. When given an opportunity he illustrates his testimony and demonstrates his conclusions by means of charts and blackboards, and usually produces the instrumentalities used by him in his work preceding the giving of his evidence, or gives satisfactory proof concerning same, so that the court and jury have the full benefit of his lights in coming to the final conclusion in the case.

Mr. Francis B. Courtney, of Cedar Rapids, Iowa, a caligraphic expert of considerable note, has published a very valuable compendium under the title, "Method of Detecting Forgery and Raised Checks, for Bank Cashiers." In this work he gives numerous photographic illustrations and etchings, some of which were applied in cases of importance in which he figured as scientific expert. It shows the manner in which the extraneous writings and the handwriting or signature in question are scientifically treated. A copy of this, or some similar work, should be in the library of every lawyer, whose business enters this field.

In the case of State v. Ryno,[1] in which Mr. Shearman was a witness, objection was made and error assigned as to the manner in which he gave his testimony, he having illustrated and demonstrated his conclusions by the aid of a blackboard, and some statements bordering on explanatory argument. But the supreme court, in considering this, said:

"Error is assigned on the admission of the testimony of J. F. Shearman, or rather on *the manner in which he gave his testimony.* It said that he is a member of the bar, and a clerk in the federal court, with

(1) 68 Kan. 348.

a state reputation as an official and citizen of exceptional natural ability and unusual accomplishments; that he is of fine personal appearance, and has had an experience of fifteen years in studying and testifying as an expert in handwriting, and that he gave his testimony with illustrations on a blackboard in an argumentative and very impressive way. The testimony does show that he had given the subject of handwriting much study and that his qualification as an expert had been recognized in many of the state and federal courts where he had been called to give testimony. His apparent intelligence, study and experience leave no doubt of his qualifications, and, in fact, the appellant does not much question his competency, but does complain of the use of the blackboard with which he illustrated his testimony. For the purpose of illustrating and explaining his testimony an expert as to handwriting may make use of a blackboard. In this way he can convey to the jury the reasons for his opinion, and make the points of similarity or difference upon which his opinion rests more intelligible to the jury."[2]

There is no invariable legal rule as to qualification in all its phases of experts in handwriting. Many persons, such as clerks, who do considerable reading or copying from miscellaneous documents, and writing, bank cashiers, and other persons whose business is such as to bring to their notice extensively the writing of other people, under circumstances which familiarize them with signatures and handwriting of all sorts, may be and often are called as experts in handwriting cases. These, however, do not very often possess the knowledge and skill necessary to give much value to their conclusions. They usually base their opinions and conclusions on the general appearance of the writing in question, and nothing more. Such testimony could not properly be rejected entirely without error. It is the duty of cross-examining counsel, in such cases, to show that the more certain methods of the writing expert have not been applied, and so weaken such testimony as to practically strike it out. Such testimony, unchallenged in a case, and not distinguished from the testimony and conclusions of the really expert, which has great probative value, is what calls forth the sweeping denunciations such as we find in the case of Cowan v. Beall:[3] "Of all kinds of testimony admitted in a court of justice, expert and opinion evidence as to handwriting is the most unsatisfactory; it is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence."

The quotation shows that this court was uninformed as to the real nature of handwriting expert exidence, properly so classed.

In Foster's Will Case,[4] the court seems also to have been quite in the dark as to what is meant by expertness in handwriting in this respect, when it said: "Everyone knows how unsafe it is to rely upon any one's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief, instead of palliating it, and the result of litigation has shown that these are often the merest pretenders to knowledge, whose notions are pure speculations. Opinions are necessarily received, and may be valuable, but at best this kind of testimony is a necessary evil. Those who have personal acquaintance with the handwriting of a person are not always reliable in their views, and single signatures, apart from some known surroundings are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called, with great liberality, scientific opinion, is a step towards greater uncertainty, and the science which is generally diffused is of very moderate value."

Whatever else this may show, it clearly shows that the judge who wrote the above opinion was wholly unfamiliar with this branch of human progress, skill and attainment.

The broad rule of the law of evidence is

(2) Citing McKay v. Lasher, 121 N. Y. 477; Dryer v. Brown, 52 Hun, 321; 15 Am. & Eng. Ency. Law (2d Ed.), 281.

(3) 1 McArth. 270.

(4) 34 Mich. 21.

that facts must be proven in a direct way. According to this, then, the only proper proof of any writing would be the testimony of one who saw the person write the particular writing, directly remembering it. But necessity often requires the law to relax the rigor of its own rules, and this makes the exception. Where primary evidence is not obtainable the secondary is admissible; where the non-production of the best evidence is excused, the best which under the circumstances can be had, within certain prescribed bounds, is received. One of the cardinal principles of evidence is that witnesses may not state mere conclusions and opinions. Here again there are the numerous exceptions. Among others, where the subject of inquiry is one embracing technical, peculiar or scientific matter, persons specially versed in these fields are permitted to state their opinions and give their conclusions of fact to aid the triers of fact, court or jury, as the case may be, who are assumed to have no more than common knowledge, to understand what would otherwise be beyond the scope of that common knowledge, and so enable them to draw a correct final conclusion in the case. In a broad sense, all those who are permitted to give such opinion evidence are classed as experts. But in the matter now under discussion, as well as in some other fields of inquiry, there are two classes of witnesses who are permitted to testify to opinions; (1) the scientific expert, and (2), those who have had special experience or contact with the matters under investigation, enabling them to make comparisons which others could not make. Both classes, however, testify in regard to the main fact to be determined as *opinion* witnesses.

In proving forgeries and in the proof of handwriting in court, both of the above classes of witnesses are used. The scientific expert, using other writings in the case for the purpose of furnishing a basis of comparison, examines such writings, (which may be otherwise wholly unknown to him), scientifically, and then makes a scientific comparison between these and the disputed writing directly in question, and upon this testifies to his conclusions. The other class, having knowledge of the particular person's general signature or handwriting, using this knowledge or their recollection of such signature or handwriting as a basis, make unscientific, but under some circumstances, nevertheless, quite reliable comparisons between this and the disputed writing, and state their conclusions. Not always recognizing these distinctions, lawyers and courts have permitted, practically unchallenged, the testimony of the class of persons already alluded to, such as clerks, bank cashiers, abstracters, etc., loosely attributing to them both kinds of proficiency and knowledge, when cross-examination, or preliminary examination as to competency, before the judge alone, would at once have developed that they had none of the scientific knowledge, art or means of determining possessed by the expert, properly so styled, and that they did not even pretend to have any direct knowledge of the person's signature or handwriting whose alleged forgery or handwriting was in question in the case.

There is a wide divergency in the textwriters, decisions and statutes as to the admissibility of extraneous writings (not otherwise relevantly and properly in the case) to be used as a standard of comparison by the expert. This deeply involves the question of relevancy. Writings otherwise relevantly and properly in the case have almost universally been held to be properly usable as exemplars or standards of comparison in connection with the disputed writing.[5]

(5) United States v. Chamberlain, 12 Blatchf. 320; Green v. Terwilliger, 56 Fed. 384; Moore v. United States, 91 U. S. 270; Stokes v. United States, 157 U. S. 187; Williams v. Conger, 125 U. S. 397; Rogers v. Tyley, 144 Ill. 652; Himrod v. Gilman, 147 Ill. 293; Frank v. Traubman, 31 Ill. App. 592; Bowen v. Jones, 13 Ind. App. 193; Swales v. Grubbs, 126 Ind. 106; Shorb v. Kinzie, 100 Ind. 429; Macomber v. Scott, 10 Kan. 335; Gaunt v. Harkness, 53 Kan. 405; State v. Thompson, 80 Me. 194; First Natl. Bank v. Robert, 41 Mich. 709; People v. Parker, 67 Mich. 222; Vinton v. Peck, 14 Mich. 287; State v. David, 131 Mo. 380; Springer v. Hall, 83 Mo. 693; Hardy v. Norton, 66 Barb. 527; People v. Fletcher, 44 App. Div. 199; Miles v. Loomis, 75 N. Y. 288; Pontius v. State, 21 Hun, 328; Dubois v. Baker, 40 Barb. 355; Shaw v. Bryant, 90 Hun, 374; Ellis v. People, 21 How. Pr. 356; Mardes v. Meyers, 8 Tex. Civ. App. 542; Cook v. First Natl. Bank (Tex.), 33 S.

Prior to 1854 the general rule in the English court of law, both criminal and civil was that the proof of handwriting by comparison by witnesses, was not permissible, but in the Ecclesiastical Courts of England proof of handwriting by comparison was always permitted.[6]

The English Common Law Procedure Act of 1854 provides that "Comparison of a disputed writing with any writing proved to the *satisfaction of the judge*, to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," and this statute was by subsequent amendment made to expressly apply to criminal cases.[7]

In the formative period of American legal history, where there were no statutes authorizing it, there was great contrariety of opinion among the courts as to whether or not proof of handwriting might be made by resort to comparison with other known genuine writings, some courts holding that the witness called upon to testify to the handwriting must testify thereto from his own actual knowledge, and even this was greatly circumscribed by other rules. The genuineness vel non could not be proved by comparison with other writings.[8]

Where not affected by the rule of recognition of state statutory provision, a modified form of the above rule still prevails in the United States courts. It is now permitted to make such comparisons where there are other writings, of the person whose writing is the matter in dispute already relevantly and properly in the case for other purposes.[9]

There is a Babel of conflict in the authorities as to whether writings, not already in evidence in the case, and which are not relevant for other purposes, although proven genuine, may be received for the sole purpose of furnishing a basis for comparison, a large number of courts holding to the rule that they cannot be received for such purpose. Other courts hold, however, that even in the absence of any statute, where the genuineness of handwriting is involved, well-tested standards of the writing of the persons whose writing is in question may be introduced for the purpose of comparison alone with that which is disputed, although the writings are otherwise irrelevant.[10]

It would seem that the only theory upon which writings not otherwise relevant can be said to be admissible for the purpose of comparison is that they constitute a species of admissions against interest by the person who is charged with the authorship of the disputed writing. Where it would constitute a declaration in his own favor made post litem motam it is now universally rejected. Where made before the exigencies of the suit arose it falls within the general rule of admissibility of matters ante litem motam. Usually such writing is a former signature of the person claimed to be the author of the signature or writing in dispute. But even if it is in the form of a document, otherwise wholly foreign to the

W. 998; Smythe v. Caswell, 67 Tex. 567; Kennedy v. Upshaw, 64 Tex. 411; Durnell v. Sowden, 5 Utah, 216; Rowell v. Fuller, 59 Vt. 688; State v. Koontz, 31 W. Va. 127; State v. Zimmerman, 47 Kan. 242.

(6) Riley v. Rivett, 1 Phill. Eccl. 78; Saph v. Atkinson, 1 Adams Eccl. 162; Locke v. Denner, 1 Adams Eccl. 353; Mudd v. Suckmore, 5 Ad. & El. 703, 31 E. C. L. 406, where this question is discussed at great length.

(7) 17 and 18 Vict., ch. 125; 19 and 20 Vict., ch. 102; 28 and 29 Vict., ch. 188; Wilson v. Thornburg, L. R. 17 Eq. 517; Reg. v. Silverlock, 2 Q. B. 766.

(8) Jackson v. Phillips, 9 Cow. (N. Y.) 94; Moore v. United States, 91 U. S. 270; Strother v. Lucas, 6 Pet. (U. S.) 763; Pope v. Askew, 23 N. C. 16; Turner v. Foxall, 2 Cranch, C. C. 324; Brooke v. Peyton, 1 Cranch, C. C. 96; United States v. Prout, 4 Cranch, C. C. 301.

(9) Holmes v. Goldsmith, 147 U. S. 150; Richardson v. Green, 61 Fed. 423.

(10) Griffin v. State, 90 Ala. 596; Riggs v. Powell, 142 Ill. 453; Bowen v. Jones, 13 Ind. App. 193; Weidman v. Symes, 116 Mich. 619; Territory v. O'Hare, 1 N. Dak. 30; Hickory v. United States, 151 U. S. 303; Bane v. Gwinn, 7 Idaho, 439 (holding to the rule last stated above); Forgey v. First Natl. Bank, 66 Ind. 123; Tyler v. Todd, 36 Conn. 218; State v. Ryno, 68 Kan. 348; State v. Thompson, 80 Me. 194; Com. v. Pettes, 114 Mass. 307; Morrison v. Porter, 35 Minn. 425; Wilson v. Beauchamp, 50 Miss. 24; State v. Hastings, 53 N. H. 452; Bell v. Brewster, 44 Ohio St. 60; Clark v. Rhodes, 2 Heisk. (Tenn.) 206; Tucker v. Kellogg, 8 Utah, 11; Johnson v. Commonwealth, 102 Va. 927; Moore v. Palmer, 14 Wash. 134.

case, it is as if the person had at some former time made a mark or picture having a tendency to trace to him the making of the writing in litigation. In the case of a witness who personally knows the signature or handwriting his recollection of the particular document or connection in which he often saw the signature or handwriting before, by means of which he became acquainted therewith, is just as irrelevant and foreign to the case in which he assumes to testify. The handwriting expert becomes acquainted with the signatures or handwritings, proven genuine and in the case for comparison purposes, by means and methods scientifically recognized; the other witness happens already to know the handwriting. What such extraneous writings otherwise expressed is as immaterial in the one case as the other.

One of the most frequent objections to the use of disputed extrinsic writings as standards of comparison is that it brings collateral issues into the case. It is argued that this results in the jury trying the authenticity of the standard used and not that of the writing really in litigation, and so tends to confuse and distract the jury.[11] Such argument is fallacious. It is the law everywhere that exemplars or standards, in order to be used, must first be clearly proven genuine—in some cases, "beyond a reasonable doubt." Otherwise they are incompetent.[12] The question of the competency of either witness or evidence is for the trial judge, and not for the jury, or the court as a trier of the main fact in a given case. It is settled first as a preliminary matter. The judge should determine the question of the genuineness of the standard without the presence or aid of the jury. Under such circumstances the jury cannot entangle themselves in collateral issues.[13]

In the Mollineux case it was held: "The sufficiency of the proof given of the genuineness of the papers offered as standards is a preliminary point to be determined in the first instance by the court, before permitting the papers to go to the jury."

Another argument against the use of such standards is that thereby the door is thrown open to the interjection of unfair specimens. A sufficient answer is found in the fact that both parties are unrestricted in the selection of specimens, and any attempted unfairness by the one can easily be corrected by the other.[14]

The question is quite at rest in many of the states where statutes have been enacted authorizing the use of genuine and authenticated writings for the purpose of comparison. These statutes differ in some points. Most of them have been before the supreme courts of the respective states. Such statutes exist in California, Georgia, Iowa, Missouri, Montana, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Kentucky, Tennessee and Texas. In California, Sec. 1944, Code Civ. Proc. provides that "the judge is required to be satisfied that the writing is genuine before he is authorized to admit it for purposes of comparison."[15] The statutes in Georgia and Kentucky provide that notice of the intended use of the genuine specimen as standard for comparison must be given to the party against whom they are to be used, with a reasonable opportunity to examine them before trial.[16] Sec. 3655, Iowa Code, provides that "evidence respecting handwriting may be given by comparison made by experts or by the jury of handwritings of the same person which are *proved* to be genuine."[17] In New York the statutes of 1880 and 1888 authorize comparison of disputed writings with any writing proved to

(11) University of Illinois v. Spalding, 71 N. H. 163.

(12) Bragg v. Colwell, 19 Ohio St. 407; Outlaw v. Hurdle, 1 Jones L. 150; Bowman v. Sanborn, 25 N. H. 98; Reed v. Spalding, 42 N. H. 122; Com. v. Coe, 115 Mass. 481; Tyler v. Todd, 36 Conn. 218; State v. Ward, 39 Vt. 225; Hyde v. Woolfolk, 1 Iowa, 159; Gilmore v. Swisher, 59 Kan. 172.

(13) Bragg v. Colwell, 19 Ohio St. 407; Rowell v. Fuller, 59 Vt. 688; Hall v. Van Vranken, 28 Hun. (N. Y.), 403; State v. Thomas, 80 Me. 194; Costello v. Crowell, 133 Mass. 352; People v. Mollineux, 168 N. Y. 264.

(14) Forgey v. First Natl. Bank, 66 Ind. 123.

(15) People v. Creegan, 121 Cal. 554.

(16) Phoenix Natl. Bank v. Taylor, 113 Ky. 61; Axson v. Belt, 103 Ga. 578.

(17) Baker v. Mygatt, 14 Iowa, 131.

the satisfaction of the court to be genuine.[18] Under the Oregon statute testimony of expert witnesses as to handwriting based on comparison with other writings admitted or treated as genuine by the party against whom the evidence is offered may be received irrespective of whether the papers so used as standards are otherwise competent or not.[19] In Pennsylvania prior to 1895, it was held that an expert witness as to handwriting must testify from an inspection of the alleged signature itself, and not from a comparison thereof with genuine signatures.[20] But in 1895 the rule in that state was changed by an express statutory provision authorizing comparison of handwritings by expert witnesses.[21] Texas at first held rigidly to the common law rule.[22] This decision met with such dissatisfaction as to place the court in serious embarrassment. The court not being disposed to recede from a position so deliberately taken, the legislature was importuned, and to relieve the situation a law was passed which provides, inter alia, that it is competent in every case to give evidence of handwriting by comparisons made by experts or by the jury.[23]

Proof of handwriting by comparison made by scientific experts is now an established factor in the jurisprudence of the country. Courts, however, should require that the persons offered as experts fully show their competency before testifying concerning the disputed writings. Lawyers and courts should be familiar with what constitutes such competency and qualification, and with the general laws of evidence which govern the matter. Necessity compels the legal profession to keep pace with the onward march of progress and attainment in this field.

GEORGE W. FREERKS,
M. C. FREERKS.
Wichita, Kansas.

(18) People v. Mollineux, 168 N. Y. 264.
(19) Holmes v. Goldsmith, 147 U. S. 150.
(20) Travis v. Brown, 43 Pa. St. 9; Berryhill v. Kirtchner, 96 Pa. St. 489; Rockey's Estate, 115 Pa. St. 453.
(21) Hagen v. Carr, 198 Pa. St. 606.
(22) Hanley v. Gandy, 28 Tex. 211.
(23) Paschall's Digest, Art. 3182.

PUBLIC UTILITIES AND THEIR CONTROL

For about forty years our people have been engaged in a contest with their public service corporations, the creatures of their own creation. Ever since the "Granger Statutes" were passed in the early 70's, this battle for the control of these corporations has been on before courts and legislatures, state and national. And the battle is still on, and is being waged with constantly increasing fury, with every prospect of its never ending.

And the reason why this battle will never end in success, as it is now conducted by the people, is very plain to all familiar with the facts. In almost every other class of legal contests the losing parties pay all costs as well as their own lawyers' fees. But not so in cases of The People v. Public Service Corporations. In all these cases, it matters not whether the corporation wins or is defeated, the corporation charges the people with everything, all the costs as well as its own lawyers' fees, which are always enormous. But the enormity of the fee is no concern of the corporation for the people pay it, and the larger it is, the more it tends to exhaust and discourage the people in their uneven contest.

In this class of cases the two parties in interest are the stockholders of the company and its patrons, or the people, who must deal with the corporation. The stockholders elect the board of directors who control and operate the corporation. Separate from this board the corporation has neither mind, soul nor tangible existence. The board thinks and acts for the corporation, and initiate, directs and controls its every act and undertaking. The directors in all this represent the stockholders and are acting for them. If they make the corporation do illegal acts and injure the public, and the corporation is sued and fined for the wrong it has done, then the stockholders, the parties who directed the wrong and expected to profit from it, should pay the fine and all the costs in the case, including lawyers' fees on both sides, which should be fixed by the court. This payment should not be made from the capital fund, but from the fund which the stockholders are entitled to receive as dividends. From the stockholders' dividends should be deducted all the costs and fines assessed against the corporation. This is the only fund from which this amount can be paid in justice to the patrons who are the parties injured and who should pay no part of the costs and fines in such cases. But if it was paid from capital then the patrons, the parties injured, would have to pay dividends on this amount of capital thus wrongfully diverted.

This method of fining a corporation for its illegal acts is truly as ridiculous as was the old law of deodands in England. Under that law, if a wagon wheel ran over and killed a man, the

wheel was forfeited to the crown for "pious uses." In that case, however, the driver, the real party responsible for the wrong, was punished by the loss of his wheel.

However, if public control is ever to be anything more than a miserable farce, there must be a radical change in the method of exercising this public control. This change will have to be such a radical, all-round change, that there will then be little difference between public control and public operation. In fact, when public control becomes so thorough and efficient as to make it impossible to commit great frauds without a certainty of going to the "Pen," no one, then, need be surprised if our so-called "magnates" quit their "jobs" and betake themselves to something more congenial to their inclinations. What is needed is an efficient public control, not a mere pretense at control.

In every public service enterprise the necessary funds are supplied by two classes of contributors, the security holders and the patrons of the concern. The security holders furnish the necessary capital for building the enterprise, equipping it and setting it to work. Then the patrons must pay a rate sufficient to pay all operating expenses, including salaries and wages; all repairs, taxes, depreciation, reasonable dividends on stock and interest on bonds, etc. The duties of these two classes are quite definitely settled.

The United States Supreme Court, in the Nebraska case, 169 U. S. 466, decided in March, 1898, defined very generally the duties of these two classes. In that case the parties controlling the corporation strenuously contended that the rates to be paid by the patrons should be sufficient to pay dividends and interest on all out-standing securities without regard to their excess. But the court said that this claim was "unsound," and it held that if a public service "corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purposes of realizing profits upon such excessive valuation or fictitious capitalization." "The rights of the public," said the court, "would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered; but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders." In the same case the court holds that the patrons must not be allowed to shirk any of their duties. In short, each of the parties, the security holders and the patrons, must perform their respective duties in a way that will be perfectly fair and honest to each other. To this no honest man will object. Nor will any honest man object to an efficient method of control calculated to protect the respective interests of both parties and shield them from injustice and imposition.

At the very beginning of a public service enterprise the interests of the security holders and the patrons are inseparably interwoven. If there is waste of capital and fraudulent expenditures in the construction of the plant the patrons will not pay dividend or interest on this waste and fraud, and the security holders must lose. If the plant is poorly constructed and equipped, the patrons' burden in maintaining repairs and the fund to cover depreciation will be greatly increased, and the security of the security holders will be greatly depreciated. And so throughout the construction and operation of the plant the interests of the security holders and the patrons are mutually the same and there is no reason why they should not work harmoniously together in preventing waste and fraud if neither party wishes to defraud the other party.

If there has been an excess of securities issued by any public service corporation it is right that the security holders should suffer the loss of this excess for the reason that these securities have been issued at their instance and under their control, while they have not allowed the patrons to have any control in this matter.

What, then, should be the method,—the way of exercising this public control,—in order that it may be efficient? In order that an excess of securities may be prevented, it is not enough to require that no securities shall be issued without first obtaining the consent of some commission or board. There must also be control over the expenditures of the proceeds of the securities in order that waste and fraud may be prevented. This would require a close supervision of all expenditures while the plant is being constructed and equipped. It must be kept in mind, that the capital must be sufficient to build and equip the plant, and if there is any waste or fraudulent expenditures an excess of securities must be issued to cover all this wrongful expenditure or the plant cannot be completed.

For the same reason, it is not sufficient to give to a commission power to fix rates only. The men who make the operating expenditures and buy the supplies will fix the rates to be paid, unless they are controlled in all these matters. The rates must be sufficient to pay all the expenditures and charges which the patrons are required to pay, and unless the commission can exercise authority over all the expenditures so as to prevent waste, fraud and graft of all kinds, its power to fix rates is a mere sham. Many comedies of this kind have been, and are still being enacted. In 1893, Nebraska passed an act fixing maximum rates. For five years the state was involved in an expensive litigation over this statute. The roads showed that the rates fixed by statute would not produce sufficient revenue to pay the patrons liabilities and

that made the statute unconstitutional. Missouri, and almost all the states are now engaged in similar contests over similar statutes. When uncontrolled, the expenditures of a corporation of this kind is a mere matter of bookkeeping, and they will always be able to show that such statutes are confiscatory and void. And thus it will ever be, unless different methods are adopted and the expenditures are supervised by the controlling power.

Public control of public service corporations has opened up new fields for lawyers and bar associations of vast importance. Public service corporations in stage-coach days were subject to public control, but there was then little necessity for that control. In those days, the stage-coach magnate was not a dangerous man. We do not want to go back to stage-coaches, but, so far, we have suffered stage-coach methods to be applied to our modern public service corporations, and this is what we must get rid of.

This is a work peculiarly adapted to lawyers, and, until they can be induced to take up this work for the good of the cities and states in which they live, very little progress can be expected. Public service officials and politicians have played with this matter long enough.

JUNIUS BEKAJA.

St. Louis, Mo.

SALES—MOMENTARY TITLE IN VENDOR ON CONDITIONAL SALE.

PARKER v. PAYNE.

Supreme Court of Mississippi, Jan. 18, 1909.

L., who owned certain mules, subject to a trust deed for $135, on becoming plaintiff's tenant, desired plaintiff to take up the debt on the mules and to advance him $50 in cash. Plaintiff and L. thereupon agreed that L. should sell the mules to plaintiff for $185, and that plaintiff should immediately resell them to L., and reserve the title until the $185 was repaid. This was done by parol, after which L. mortgaged the mules by a trust deed for supplies for the benefit of another. Held that, since plaintiff never had title to the mules, except momentarily, for the purpose of creating a conditional sale to L., the transaction was but a verbal mortgage, and unsustainable.

FLETCHER, J.: The learned circuit judge gave a peremptory instruction to find for the appellee upon the following state of facts: One Little, late in the year 1906, became Payne's tenant, and moved upon his plantation. At the time Little owned two mules, upon which a third party held a trust deed for about $135. It appears that Mr. Payne had been advised by his attorney that personal property could be sold conditionally and the title thereto reserved to the vendor, and that the lien so reserved would be superior to any subsequent incumbrance by the conditional purchaser. Payne testifies that he acted in the transaction upon the idea that such an arrangement was a convenient, safe, and economical method of securing his debt, since it would obviate the need for recording fees and other expenses. Little was anxious for his landlord to take up the debt, and desired a further advance of $50 in cash. Thereupon Payne and Little entered into an agreement by which Little was to sell Payne the mules for $185 and Payne was to immediately resell the property to Little and reserve the title. This was done; the entire transaction resting in parol. Subsequently Little mortgaged the property to W. M. Thompson & Son by a trust deed, in which Parker is substituted trustee. The former trust deed, which was paid by Payne, was satisfied, so that, when Thompson & Son took their security, no incumbrance against the property appeared of record. It is shown that Little, with Payne's knowledge, obtained supplies from Thompson & Son throughout the year, and, indeed, Payne admits that he encouraged Little to buy from Thompson all the supplies he needed; that, to use his own phrase, he said to Little that "he missed it in not going and loading up on him."

We have no disposition to depart from the rule, now thoroughly established in this state, that personal property may be sold with verbal retention of title, and that the claim of the vendor to the purchase money will prevail over the claim of subsequent grantees. But we cannot hold as a matter of law that Payne ever actually owned the mules here in controversy. The whole transaction must be examined. The mules were not purchased from Payne in the first instance. They were bought from one, Lawson. The sole purpose of the alleged sale to Payne was that title might momentarily vest in him for the purpose of an instantaneous resale, in order that the relation of the vendor and conditional purchaser might exist. The whole transaction might well be considered as nothing more than a verbal mortgage—an effort to substitute for a trust deed a pretended sale and resale, whereby innocent purchasers and incumbrancers would be defrauded. If this transaction is to be upheld, chattel mortgages will disappear. All borrowers upon personal property as security will simply agree with the lender to make a sale, accompanied by constructive delivery of the property, and buy the property back in the same transaction. We have here an illustration of a most flagrant wrong committed to the manifest injury of an innocent supply mer-

chant. It is true that, under the previous decisions of this court, one taking a trust deed upon personal property must see to it that the person from whom the property was purchased has not reserved the title, or that he has been paid; but he cannot be defeated by constructive sales and resales, had between persons who in reality sustain no other relation than that of creditor and debtor. We will not push the doctrine one inch further than it has already gone. In order for the seller to enforce his claim, he must be in fact the owner of the property, and make a bona fide sale thereof to a bona fide purchaser, by which sale the actual possession of the property shall be in truth changed. The peremptory instruction should have been given for the appellant, and not for the appellee. A full statement of the facts will be set out by the Reporter.

The suggestion of error is sustained, the former judgment vacated, and the cause reversed and remanded.

NOTE—*Damages Recoverable of Subvendee by Conditional Vendor.*—The great weight of authority is, as the principal case holds, that a reservation of title in a conditional sale makes property non-transferrable to a subvendee and non-lienable in favor of a subsequent incumbrancer, though each acts in good faith, paying value and without notice, and statutes in reference to conditional sales being in writing and recording are merely for the purpose of mitigating or extirpating the evil arising from apparent ownership as arising from possession delivered under a conditional sale. The particular question in the principal case, ruling upon which was dissented from by Mr. Chief Justice Whitfield, is ruled as seen without citation of authority, nor does the dissenting opinion cite any authority. Technically the majority opinion does not appear to us sound. All statutes as to writing, recording, etc., are in derogation of a fixed principle, and that principle seems as capable of bringing woe upon "innocent purchasers and incumbrancers" as if a seller had been a momentary or other kind of owner. But it was a principle in law and we cannot see that a momentary owner, recognized by the parties as a full owner and for full value, with no element of fraud in the transactions, adds to the peril that may overtake "innocent purchasers and incumbrancers." It looks to us like the majority opinion assumes it is "pushing the doctrine one inch further," when it is not pushing it further at all. It on the contrary is setting aside as null and void a transaction that is perfectly legitimate between original parties, and, on the contrary, it is made to enure to the benefit of others as to whom it was purely an accidental circumstance.

We are, however, in the position as to the precise ruling made of what appears to be that of the Mississippi court. We find no case in point.

But our heading suggests annotation on another line (from which we have been diverted by the above criticism), i. e., what should be the extent of recovery, where there has been a resale by the conditional vendee, part of the purchase price having been paid? The rule is a harsh one to allow recovery by the vendor for full value, even where there is a forfeiture provision of all prior payments, if default ensues. In Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458, it was provided that the general title to the property was retained until all of the purchase price was paid. It was argued that even upon principle, recovery ought only to be for the amount remaining unpaid, but this was not squarely decided, because there was an inference to be drawn from the New York conditional sales statute that this was the true rule in that state. That statute provided that if goods are retaken by a vendor, the vendee has thirty days within which to comply with his contract.

A subvendee was deemed a successor in interest. In Woods v. Nichols, 21 R. I. 37, 45 Atl. 548, 48 L. R. A. 773, this was held to be the measure of recovery against a purchaser from the vendee, that is, for the balance of the price unpaid, and not even that sum, if use by the conditional vendee had depreciated its value below that sum.

In Georgia this measure of recovery was applied in behalf of a purchaser who knew there was retention of title, the court saying, "In strict justice and in accordance with the principles ruled in Bradley v. Burkett, 82 Ga. 255, and the cases there cited the recovery of the plaintiff, ought not to have exceeded in value the amount remaining due upon the purchase price of the property, with interest thereon." A remittitur was directed. Morton v. The Frick Co., 87 Ga. 230, 13 S. E. 463.

But there are quite a number of cases to the effect that the full value of the property converted by a third person through the conversion or through purchase from the vendee, is recoverable. Thus, in Maine it was said: "In an action of trover brought by the vendor against a third person, who has purchased of the conditional vendee for value received, the plaintiff is still entitled to recover the full value of the property at the time of the conversion, although but a single dollar of the purchase money remains unpaid. Hawkins v. Hessey, 86 Me. 304, 30 Atl. 14. This principle found application in the case of Morgan v. Kidder, 55 Vt. 367, where there was a conditional sale of cattle. The vendee sold off a portion, and the price received therefor was paid to the vendor, who credited the amount on vendee's note, vendor not knowing the source from which the money was derived. The court said: "The wrong done to plaintiff was to diminish his security, which vendee was bound to keep good until the whole debt was paid. If the avails of the cattle had paid the whole debt, there would be good reason for mitigating the damages, although the sale took place before the debt was paid. If the proceeds of sale should be allowed in mitigation here, the plaintiff derives no benefit, because, although Green's debt was diminished, he has lost or been compelled to part with an equivalent amount of property." This case, however, may not be strictly in point, as it might be, that the remaining property might not be so available as security for balance of indebtedness as the entire property for the entire indebtedness, there, indeed, being a sort of presumption that it is not.

In an early Massachusetts case (Angier v. Taunton Paper Mfg. Co., 1 May, 621, 61 Am. Dec.

436, the measure of damages was held to be the entire purchase price, with interest from the time of conversion, and this was later followed in Colcord v. McDonald, 128 Mass. 470. In Louisiana the rule is stated to be recovery for full **value** of the property, but in that case it appeared that its full value was less than the unpaid balance, the court saying the measure was full value of the property, which question seemed not necessarily involved, except as it applied to that case. Seelig v. Dumas, 48 La. Ann. 1494, 21 So. 91.

Upon whom does loss fall if property is destroyed without fault of vendee.—It might be argued especially in cases where on default by conditional vendee all payments should be forfeited, that, vendee, not being at fault, the vendor retaining title, suffered loss from destruction of property. And so it has. A late Vermont case is instructive on this question. La Valley v. Ravenna, 62 Atl. 47, 2 L. R. A. (N. S.) 97. The agreement for sale was crude in form and recited that the property was conditionally sold with title to remain in vendor until paid for, with the right to retake possession on default, all payments made to be forfeited. There was no express agreement to pay. The property was destroyed before the price fell due, and no fault was attributed to vendee. The court held vendee liable, deeming there was a promise to pay not conditioned on anything further on the part of the seller. "The seller had done all that he was to do to, or with the property, by the terms of the contract—all that he was to do at all except to receive the price." The vendee "could not return the property to the seller and thereby avoid further liability." To same effect is Bunley v. Tufts, 66 Miss. 49, 5 So. 627, 14 Am. St. Rep. 540; Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, 22 Am. St. Rep. 863, 10 L. R. A. 526. In American S. F. Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54, there was the additional circumstance that the purchaser agreed to insure the property, making the loss, if any, payable to the seller as its interest might appear, but this was not deemed very material, the theory being that title is retained merely as security for unpaid purchase money.

There are some cases which seem to be against the rule above expressed, but it is believed that an examination will not show that the principle above stated is militated against. Thus, in one of these cases, Arthur v. Blackman, 63 Fed. 536, the contract stated that the sole consideration was an agreement by plaintiffs to sell and transfer the property upon the payment of the note, and this was called an executory contract of sale. In Swallow v. Emery, 111 Mass. 355, the opinion said: "It appears that the plaintiff delivered the horse, wagons and harness to Waby, to be used, and under a contract of sale that the stipulated price should be paid." This being done, plaintiff was to give a bill of sale. This was held an executory contract for sale. In Randle v. Stone, 77 Ga. 501, there was an express condition that "the title, ownership or possession" should not pass until payment of the note, and this was regarded as creating a bailment. It may be doubted even whether these cases are really distinguishable, as not coming under the ordinary rule, but, if they are outside of it, it is readily perceivable that some of these elaborate contracts providing for rental, money paid being for rent, etc., etc., might leave the property at the risk of the seller.

N. C. COLLIER.

CORRESPONDENCE.

ENFORCEMENT OF OBSOLETE LAWS.

Editor Central Law Journal:

Every number of your valuable journal is read with interest, but no editorial has seemed to me so worthy of commendation as the "Enforcement of Obsolete Laws," in 67 Cent. L. J. 141.

In a recent prosecution of saloonkeepers for keeping their saloons open on Sunday in violation of both the state laws and police ordinances of the city of Denver, where the evidence of the guilt of the defendants was overwhelming, and not denied by the defendants themselves, the Police Judge, Hon. B. F. Stapleton, said: "I claim the right to trim down these ordinances when I think they are too severe."

Surely, if judges or juries can violate the law with impunity, and disregard their solemn oaths to do their duty, then is anarchy at the door of our institutions.

Long may the Central Law Journal stand for the fearless enforcement of law.

Yours very truly,

JOHN HIPP.

Denver, Colo.

HUMOR OF THE LAW.

A short time ago an old negro was up before a judge in Dawson City, charged with some trivial offense.

"Haven't you a lawyer, old man?" inquired the judge.

"No, sah."

"Can't you get one?"

"No, sah."

"Don't you want me to appoint one to defend you?"

"No, sah; I jes' tho't I'd leab de case to de ign'ance ob de co't."—Philadelphia Public Ledger.

The lawyer said sadly to his wife on his return home one night: "People seem very suspicious of me. You know old Jones? Well, I did some work for him last month, and when he asked me for his bill this morning, I told him out of friendship that I wouldn't charge him anything. He thanked me cordially, but said he'd like a receipt."—National Farmer.

"O, you're killing me!" cried a male voice, 'Have you no pity?'" said Senator Foraker, telling his story of a seaside hotel to illustrate hasty verdicts.

"There followed a series of awful groans. Then:

"'Stop! You are murdering me! I'm dying.'

"For a little while the crowd outside heard feeble grunts and moans. Then a wild shriek rang forth.

"'Murder! You've done it at last. You've killed me. O, I'm dying.'

"'What deed is going on in there?'

"There was a smothered laugh within, the door was opened instantly, and a young and pretty woman appeared.

"'Did the noise alarm you?" she said. "I've just been peeling off the shirt from my husband's sunburnt arms.'"—Philadelphia Record.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Action**—Pleading.—One suing for the cancellation of a contract must bring forward in one suit all his grounds.—Moehlenpah v. Mayhew, Wis., 119 N. W. 826.

2. **Adultery**—What Constitutes.—Sexual intercourse between two persons not husband and wife, either or both of whom are married, constitutes statutory adultery.—State v. Anderson, Iowa, 118 N. W. 772.

3. **Adverse Possession**—Character of Possession.—Where a claimant by adverse possession changes the character of his possession, a former acknowledgment of title in another will not serve to defeat his title by adverse possession under the new claim.—Criswell v. Noble, 113 N. Y. Supp. 954.

4.——Extent of Possession.—The rule that a person in actual possession of a few acres is entitled, under the statute, to recover 160 acres, only applies where there is an assertion and claim to the 160 acres.—Williams v. Texas & N. O. R. Co., Tex., 114 S. W. 877.

5.——Hostile Character of Possession.—The possession or right acquired by a purchaser of the curtesy rights of a husband is not adverse to the children of the deceased wife, to whom the land on her death descended subject to the husband's curtesy.—Kohle v. Hobson, Mo., 114 S. W. 952.

6. **Animals**—Liability of Owners.—At common law, one harboring a dog knowing him to be vicious, as well as the owner in possession, is liable for the injuries committed by him.—Alexander v. Crosby, Iowa, 119 N. W. 717.

7. **Appeal and Error**—Law of the Case.—The decision of the supreme court on appeal from an order sustaining a demurrer held the law of the case, and governs in determining the sufficiency of an amended complaint.—Uecker v. Thiedt, Wis., 119 N. W. 878.

8.——Review.—The Court of Appeals must presume, in the absence of a showing to the contrary, that the orphans' court properly exercised its powers in allowing commissions to an executor.—In re Watts' Estate, Md., 71 Atl. 316.

9.——Solicitor's Fees.—Where the question of allowance of solicitor's fees is not presented in the lower court, it cannot be considered on appeal.—Beck Coal & Lumber Co. v. H. A. Peterson Mfg. Co., Ill., 86 N. E. 715.

10.——Statement of Facts.—Though the record on appeal without the evidence presents features of gross injustice at trial, in the absence of a statement of facts, every presumption in favor of judgment below must be indulged.—Dilley v. Jasper Lumber Co., Tex., 114 S. W. 878.

11.——Supersedeas.—Supersedeas on appeal from a modifying order confers no affirmative right, but prevents the court from enforcing the modifying order appealed from.—Hohenadel v. Steele, Ill., 86 N. E. 717.

12.——Theory of Case.—A case must proceed in the Supreme Court on the same theory on which it was tried below.—Morrison v. Roehl, Mo., 114 S. W. 981.

13. **Assault and Battery**—Indecent Assaults.—In a prosecution for aggravated assault on a female by fondling her in an indecent manner, testimony as to complaints made by prosecutrix two weeks after the assault held inadmissible.—Saye v. State, Tex., 114 S. W. 804.

14. **Assignments**—Effect on Liability to Assignor.—Partial assignments of a debt not consented to by the debtor held no defense to the creditor's right to recover the entire claim.—Thiel v. John Week Lumber Co., Wis., 118 N. W. 802.

15. **Attorney and Client**—Authority of Attorney.—Where defendants knew that an attorney was defending an action and appealed from the judgment therein in their name, they were bound by the judgment.—Emerson v. McDonell, Wis., 118 N. W. 814.

16. **Bankruptcy**—Action by Trustee.—In an action by a trustee in bankruptcy to recover a preferential payment of a note, a specific finding directed to the special question of the time of payment controls a conflicting finding merely recapitulating the notes of the bankrupt with their dates of payment.—Evans v. Claridge, Wis., 118 N. W. 803.

17.——Non Scheduled Assets.—Creditors of a bankrupt after termination of the proceedings held entitled to subject an equity of redemption in mortgaged property not listed either through oversight or fraud.—Horn v. Bates, Ky., 114 S. W. 763.

18. **Banks and Banking**—Criminal Responsibility of Officers.—A special presentment, charging bank officers with violation of Civ. Code 1895, Sec. 1948, held fatally defective, where it fails to allege that such bank was a bank of issue.—Thornton v. State, Ga., 63 S. E. 301.

19. **Bastards**—Settlement with Father.—The mother of an illegitimate child may by a fair settlement with the putative father preclude herself and the county from maintaining a bastardy proceeding.—State v. Meier, Iowa, 118 N. W. 792.

20. **Benefit Societies**—Change of Beneficiaries.—A change of beneficiaries in a benefit certificate on the assumption that the certificate was lost held to entitle the new beneficiaries to the proceeds of the certificate.—Raschke v. Gegenseitige Unterstuetzungs-Gesellschaft, Germania, Wis., 119 N. W. 812.

21.——Right to Proceeds of Certificate.—A person caring for a member of a mutual benefit society during an illness held not entitled to participate in the proceeds of the certificate under the by-laws.—Severa v. National Slavonic Society of the United States, Wis., 119 N. W. 814.

22. **Bills and Notes**—Attorney's Fees.—Where a note stipulated for the payment of attorney's fees if it was placed in the hands of an attorney for collection on non-payment, when it was given to an attorney for collection, the attorney's fees became a part of the debt.—First Nat. Bank of Houston v. J. I. Campbell Co., Tex., 114 S. W. 887.

23. **Boundaries**—Agreed Line.—Where adjoining proprietors are ignorant of the location of the true line and agree on permanent line, they are bound thereby.—Foard v. McAnnelly, Mo., 114 S. W. 990.

24.——Division Line.—Adjoining proprietors held not bound by a surveyed boundary line, in the absence of a prior agreement that the line, when surveyed, should be considered as the true line.—Foard v. McAnnelly, Mo., 114 S. W. 990.

25.——Suit to Establish.—In a suit to establish a boundary, the lines of surveyors in attempting to locate the line are not binding on the parties, and the evidence of such surveys is only admitted to aid the jury in finding the location of the line as originally run.—Runkle v. Smith, Tex., 114 S. W. 865.

26. **Cancellation of Instruments**—Mistake or Fraud.—To entitle one to rescind a contract on the ground of mistake or fraud, as established by the evidence he must plead a case of fraud and mistake, or fraud or mistake.—Moehlenpah v. Mayhew, Wis., 119 N. W. 826.

27. **Carriers**—Delay in Transportation.—A consignee of a carload of potatoes held not entitled to cost of labor and sacks in resacking the potatoes, made necessary by his delay in unloading them.—Gulf, C. & S. F. Ry. Co. v. Chinski, Tex., 114 S. W. 851.

28.——Failure to Promulgate Rates.—That a carrier failed to post its schedules and tariff sheets in a depot, as required by the interstate commerce law, does not affect the validity of the rates promulgated, filed with the interstate commerce commission, and deposited with the station agent.—Mires v. St. Louis & S. F. R. Co., Mo., 114 S. W.1052.

29.——Injuries Caused by Swinging Doors.—In a suit for injury to a passenger caused by glass in a swinging door breaking when he pushed against it to open the door, which was locked, the burden held on the company to explain why the door was locked.—McCormack v. Interborough Rapid Transit Co., 113 N. Y. Supp. 1006.

30.——Injury to Passenger in Automobile.—Though a collision resulting in injury to a passenger in an automobile occurred by reason of the breaking of a brake rod on the automobile owing to a latent defect in such rod, the driver of the automobile was liable, where the accident would not have happened if he had had his machine under control.—Johnson v. Coey, Ill., 86 N. E. 678.

31.——Limitation of Liability.—A stipulation that an express company should not be liable beyond $50 unless a different value was given, held invalid as a limitation of liability, under Hurd's Rev. St. 1905, c. 27.—Cutter v. Wells Fargo & Co., Ill., 86 N. E. 695.

32. **Charities**—Certainty as to Purpose of Gift.—A devise of the residue of testator's estate to his executor, to be paid over to such "religious, educational or eleemosynary institutions" as to the executor may seem advisable, held invalid for indefiniteness of purpose, and not rendered valid.—In re Shattuck's Will, N. Y., 86 N. E. 455.

33. **Chattel Mortgages**—Priorities.—A purchase-money mortgage given by a tenant when property was purchased is a lien on the property so purchased prior to the landlord's lien for rent.—Anundson v. Standard Printing & Mfg. Co., Iowa, 118 N. W. 789.

34. **Conspiracy** — Unlawful Combinations.—Where an unlawful combination exists, it is none the less unlawful because it exists under a self-imposed constitution and is governed by by-laws.—Lohse Patent Door Co. v. Fuelle, Mo., 114 S. W. 997.

35. **Constitutional Law**—Boards of Health.—Gen. St. 1895, p. 1638, Sec. 15, forbidding suits against the board of public health, its officers, or agents, unless the board acted without reasonable and probable cause, does not infringe the constitutional provisions protecting private property and individual liberty.—Valentine v. City of Englewood, N. J., 71 Atl. 344.

36. **Contracts**—Failure to Perform.—A building contractor will be excused from completing the contract, if completion is prevented by the insolvency of the owner or failure to make the prescribed payments.—Lunsford v. Wren, W. Va., 63 S. E. 308.

37. **Corporations**—Transfer of Stock.—The owner of all the stock of a corporation who transferred his stock, and to secure the purchase price took a pledge of such stock, held to have the right to compel the stock pledged transferred to him on the books of the company.—Goetzinger v. Donahue, Wis., 119 N. W. 823.

38. **Costs**—Waiver.—A solicitor's failure to accept the offer of the opposing party's solicitors to have their costs taxed by the clerk, upon settlement of the litigation, held to be a waiver to prevent the Secretary of State and State Treasurer from disbursing state moneys for illegitimate purposes.—State v. Frear, Wis., 119 N. W. 894.

39. **Courts**—Taxpayer's Action.—The Supreme Court may entertain an original action of the right to have the costs taxed.—Crane v. Gurnee, N. J., 71 Atl. 338.

40. **Covenants**—Performance. — Where, in trespass to try title, there is an issue as to the title between a grantor and a third person, the grantor, as against the third person, can show any title which his grantee may have to the lands.—Pierce v. Texas Rice Development Co., Tex., 114 S. W. 857.

41. **Criminal Evidence**—Admissibility.—Reading from the notes of the official stenographer of testimony of a deceased witness, taken at a former criminal trial, held not to contravene accused's constitutional right to be confronted with witnesses.—Arnwine v. State, Tex., 114 S. W. 796.

42.——Admissibility.—In a prosecution for keeping a disorderly house, fact that certain evidence would tend to convict defendant of another offense was not ground for its exclu-

sion, where it was relevant to the crime charged.—People v. Jones, 113 N. Y. Supp. 1097.

43.——Conflicting Statements.—In a prosecution for theft of a horse testimony that, when witness arrested accused for another crime, he made conflicting statements as to where he got the horse, was inadmissible.—Robinson v. State, Tex., 114 S. W. 811.

44.——Hypothetical Questions.—Error of the court in permitting the state to propound a hypothetical question to defendant's character witnesses was not ground for reversal where the court subsequently struck out the questions and the answers thereto, and admonished the jury not to consider the same.—Duncan v. State, Ind., 86 N. E. 641.

45. **Criminal Law**—Preliminary Examination.—The fact that accused had not been accorded a preliminary examination can be taken advantage of by directing the attention of the court to the fact by appropriate motion.—Buckley v. Hall, Mo., 114 S. W. 954.

46. **Criminal Trial**—Conspiracy.—Where two persons are charged with a conspiracy to commit a crime, and the identity of one is established and the identity of the one on trial is disputed, the circumstances of the conspiracy showing motive and identity are admissible in evidence.—Deisenbach v. State, Wis., 119 N. W. 843.

47.——Former Conviction.—Where a trial is had a second time in the same court on the same indictment, no plea of former jeopardy need be pleaded, because the whole record is before the court.—De Leon v. State, Tex., 114 S. W. 828.

48.——Instructions.—On a trial for manslaughter, it is error to charge that the state might prove the offense at any time within two years immediately preceding the date alleged in the indictment.—Mitchum v. State, Fla., 47 So. 815.

49. **Damages**—Mental Suffering.—In an action against a carrier, held that plaintiff could recover under his complaint for the mental and physical suffering of his wife.—St. Louis Southwestern Ry. Co. of Texas v. Franks, Tex., 114 S. W. 874.

50. **Deeds**—Delivery.—Where a deed was given to his attorney by plaintiff's husband with instructions not to deliver it, unless plaintiff signed it, which she refused to do, there was no delivery.—Marble v. Marble, Tex., 114 S. W. 871.

51.——Mental Weakness.—Mere mental weakness will not authorize the setting aside of a deed if it does not amount to inability to comprehend the effect and nature of the transaction, and is not accompanied by evidence of imposition or undue influence.—Clarke v. Hartt, Fla., 47 So. 819.

52. **Depositaries**—Appointment of Depositories.—The books of a banker receiving county funds on deposit are admissible against the sureties on his bond for the purpose of establishing a prima facie case.—Kuhl v. Chamberlain, Iowa, 118 N. W. 776.

53. **Divorce**—Indignities.—A husband's conduct in dividing his time between his home and his business will not amount to a statutory intolerable indignity, unless his neglect of his wife amounted to desertion, or he displayed contempt or aversion for her, or unless his neglect was so extreme as to constitute cruelty and prey on her health and spirits.—Holschbach v. Holschbach, Mo., 114 S. W. 1035.

54.——Order of Publication.—The notice of the order of publication to be served in a suit for divorce must state the object of the suit; and, if it asserts the grounds of relief, it must state grounds which give jurisdiction to the court.—Brant v. Brant, N. J., 71 Atl. 350.

55. **Drains**—Assessments.—A second assessment for an improvement in the drainage system may be made to complete the improvement where the first assessment proves inadequate.—People v. Gunzenhauser, Ill., 86 N. E. 669.

56.——Finality of Judgment.—A judgment of the circuit court, dismissing a proceeding to establish a public ditch, was a final judgment, because it finally disposed of the proceeding in that court.—Lake Shore Sand Co. v. Lake Shore & M. S. R. Co., Ind., 86 N. E. 754.

57. **Ejectment**—Parties.—Where grantors reserved timber on the land, except such as the grantee should use in mining operations, the grantors were proper parties complaining in a bill of ejectment.—Breckenridge Cannel Coal Co. v. Scott, Tenn., 114 S. W. 930.

58.——Title of Plaintiff.—In view of the requirement of St. 1898, Sec. 2203, for conveyance of homestead, plaintiff, under a conveyance to him of A.'s homestead by A. without his wife joining, held not to have the legal right necessary under section 3074 for maintenance of ejectment.—Wilburn v. Land, Wis., 119 N. W. 803.

59. **Elections**—Conclusiveness of Results.—The result of an election favoring a proposition is conclusive, and not subject to collateral attack for insufficiency of the majority, in the absence of an affirmative showing of insufficiency by admission of the parties, or the result of the vote on other propositions and of officers.—Treat v. De Jean, S. D., 118 N. W. 709.

60.——Qualification of Voters.—Payment of personal property taxes, required to entitle the persons assessed to vote, by another, without authority of such taxpayers, does not qualify them to vote.—Lennon v. Board of Canvassers & Registration of City of Pawtucket, R. I., 71 Atl. 305.

61. **Election of Remedies**—Acts Constituting.—A seller having begun suit for balance due, on breach of contract of conditional sale, held precluded from subsequently suing in replevin, though the former suit was not prosecuted to judgment.—Frisch v. Wells, Mass., 86 N. E. 775.

62. **Eminent Domain**—Compensation.—Where land is taken under the statute by hostile proceedings in condemnation, the owner is entitled to compensation for the land actually taken, as well as compensation for the damages to the other land affected.—Jeffery v. Chicago & M. Electric R. Co., Wis., 119 N. W. 879.

63. **Equity**—Maxims.—Equity looks on that as done which ought to be done, and, for the purpose of reaching justice, it will consider that parties have performed the duties which they ought to have performed.—Doscher v. Wyckoff, 113 N. Y. Supp. 655.

64. **Estoppel**—Property Rights.—A property right created in favor of one by estoppel is superior, in general, to the statute of frauds and the statutory provisions with reference to the execution of wills and conveyances of real and personal property.—McDowell v. McDowell, Iowa, 119 N. W. 702.

65. **Evidence**—Admissions Against Interest.—On the issue of the agreed salary of an employee, an application for an employee's bond reciting the amount of the salary held admissible as an admission of the employer against interest.—Ackerman v. Berriman, 113 N. Y. Supp. 1015.

66.——Judicial Notice.—Judicial notice will not be taken of an adjudication by the Interstate Commerce Commission that a rate is unreasonable and unjust.—Robinson v. Baltimore & O. R. Co., W. Va., 63 S. E. 323.

67.——Parol Evidence Affecting Writing.—A party who must himself by parol show that one who signed a note is a surety cannot complain that by parol it is shown that he signed only as a witness.—Barco v. Taylor, Ga., 63 S. E. 224.

68. **Exceptions**—Refusal of Judge to Sign.—Where a judge refuses to sign a bill of exceptions because it is incorrect, it is not his duty to notify the exceptor's counsel nor return the bill to him within the time limit with his reasons for declining to sign it indorsed thereon.—State ex rel. Windsor v. Taylor, Mo., 114 S. W. 1029.

69. **Executors and Administrators**—Collateral Attack.—An order of the probate court appointing an executor, if made in the exercise of proper jurisdiction, though based on erroneous conclusions of law or fact, cannot be collaterally attacked.—Union Savings Bank & Trust Co. v. Western Union Telegraph Co., Ohio, 86 N. E. 478.

70.——Commissions.—The fixing of executor's commissions within the limits prescribed by statute resting in the discretion of the court, it will consider the nature and extent of his labor, with the aim of allowing a fair compensation for the services rendered.—In re Watts' Estate, Md., 71 Atl. 316.

71. **Fish**—Statutory Regulations. — Forest. Fish, and Game Law (Laws 1900, p. 32, c. 20) Sec. 52, held to prohibit the throwing of sawdust into the waters of the state in quantities sufficient to destroy the fish therein; but does not prohibit the deposit of sawdust in sufficient quantity to ruin the stream as a spawning bed.—People v. Lapell, 113 N. Y. Supp. 675.

72. **Fraud**—Sufficiency of Evidence.—In an action to recover excessive commissions paid because of defendant's fraudulent misrepresentations, evidence held not to show an intentional misrepresentation so as to make out a case of fraud.—Moran v. Brown, 113 N. Y. Supp. 1038.

73. **Fraudulent Conveyances**—Mortgages.—Where a debtor has fraudulently conveyed his property, a judgment creditor may sell it as if no sale had been made, and after procuring a deed sue to quiet his title.—Kingman Plow Co. v. Knowlton, Iowa, 119 N. W. 754.

74.——Persons Entitled to Assert Invalidity.—A bail in a criminal recognizance, to whom a bond has been given to indemnify him against loss, may file a bill before payment of the recognizance to set aside a deed by the obligor in such indemnity bond as made with intent to defraud him.—Carr v. Davis, W. Va., 63 S. E. 326.

75. **Guaranty**—Discharge of Guarantor.—A guarantor is discharged by any alteration of the contract to which his guaranty applied, whether material or not, and whether or not the alteration is to his injury.—Weiss v. Leichter, 113 N. Y. Supp. 999.

76. **Health**—Liability of Members of Board.—The members of a board of health acting under the statute to prevent the spread of an infectious disease are not personally liable for damages from the establishment of a quarantine, though the disease does not actually exist.—Valentine v. City of Englewood, N. J., 71 Atl. 344.

77. **Highways**—Frightening Animals.—In an action against one in charge of an automobile for frightening an animal and thus causing the death of plaintiff's decedent, evidence as to former convictions of defendant for violating speed ordinances held inadmissible.—See v. Wormser, 113 N. Y. Supp. 1093.

78. **Homicide**—Evidence.—On a trial for murder, it was error to allow the state to show that witness had never heard of decedent having a reputation for interfering with other people's laborers, where defendant did not claim that as a justification of the shooting.—Turner v. State, Ga., 63 S. E. 294.

79.——Resisting Arrest.—In attempt to arrest for crime, where threats are made to resist, even to taking the lives of the officers, on trial for the latter offense evidence of the former criminal offense held admissible.—Weisenbach v. State, Wis., 119 N. W. 843.

80.——Sanity.—Accused was responsible for a homicidal act, if at the time he had sufficient mind to comprehend his relation to others, or, knowing the criminal character of the act, was conscious that he was doing wrong; otherwise not.—State v. Cloninger, N. C., 63 S. E. 154.

81. **Husband and Wife**—Action for Separation and Support.—That an absolute divorce had been refused a husband because of the adultery of both him and his wife held not to preclude his urging the wife's guilt as a defense in her action for separation and support under Code Civ. Proc. Sec. 1765.—Hawkins v. Hawkins, N. Y., 86 N. E. 468.

82.——Community Property.—A wife held not entitled to premiums on or proceeds of life policy taken out by her husband for his children by a former marriage, premiums of which had been paid from community funds.—Rowlett v. Mitchell, Tex., 114 S. W. 845.

83.——Tax Sale.—A purchase of a certificate of purchase at a tax sale by the husband of a tenant in common held to inure to the benefit of all the tenants in common.—Kohle v. Hobson, Mo., 114 S. W. 952.

84. **Indictment and Information**—Clearness and Certainty.—In construing a charge of crime nothing is to be taken by intendment, nor can the lack of material averments in the indictment be supplied by mere matters of recitation or by inference from other statements.—State v. Clark, Iowa, 119 N. W. 719.

85.——Time of Offense.—In an indictment for adultery, it is sufficient to allege that the crime was committed within the period of limitation, without charging specific acts on specific dates.—State v. Anderson, Iowa, 118 N. W. 772.

86. **Injunction**—Right to Relief.—A private citizen cannot obtain an injunction against threatened commission of crime or other public wrong not involving special injury to property rights.—Campbell v. Jackman Bros., Iowa, 118 N. W. 755.

87.——Special Elections. — An injunction against the holding of a special election on the question of maintaining county dispensaries

will be denied where petitioners have a plain and adequate legal remedy; no property rights being involved.—Little v. Barksdale, S. C., 63 S. E. 308.

88. **Intoxicating Liquors**—Nuisance. — The sale of intoxicating liquors is not a nuisance per se, but a business which the Legislature may regulate.—Campbell v. Jackman Bros., Iowa, 118 N. W. 755.

89. **Judgment**—Collateral Attack.—A judgment of a court of general jurisdiction is not subject to collateral attack because it does not show an essential fact, where on the whole record that fact otherwise appears.—Cooper v. Gunter, Mo., 114 S. W. 943.

90.——Equitable Relief.—A court of equity will not restrain the execution of a judgment at law, except where the ground for interference is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory.—Boring v. Ott, Wis., 119 N. W. 865.

91.—Res Judicata.—Where no issue was made by the pleadings betwen two defendants in an action, it might be shown in a subsequent litigation between them that the issue therein was not adjudicated in the former action.—Moehlenpah v. Mayhew, Wis., 119 N. W. 826.

92. **Jury**—Objections Not Raised Below.—Accused could not on appeal complain that he was required to go to trial before, and challenge from, a jury drawn prior to his announcement of ready for trial, where he made no objection until after the trial.—Moore v. State, Tex., 114 S. W. 807.

93. **Justices of the Peace**—Procedure.—Where defendants appeared in an action before a justice on the return day and procured an adjournment giving the court jurisdiction, they were bound to take notice of a continuance ordered at plaintiff's instance, even though they failed to appear and give express consent thereto.—Gilman v. Weiser, Iowa, 118 N. W. 774.

94. **Landlord and Tenant**—Damage Caused by Leaking Roof.—A lessor held not liable for injury to the tenant's goods from water leaking through the roof during an extraordinary rainfall, and while the roof was so thickly covered with snow and ice that the water was forced above the chimney flashings.—Gutman v. Folsom, 113 N. Y. Supp. 691.

95.——Failure to Make Repairs.—A tenant of a flat was justified in quitting, where the landlord persistently neglected to repair a defective roof.—Zbarazer Realty Co. v. Brandstein, 113 N. Y. Supp. 1078.

96.——Wineroom.—A licensed saloonkeeper cannot evade the wineroom ordinance by renting a part of the room covered by his license to a third party, so arranged that it may be used as a wineroom in connection with his bar.—State v. Brown, Minn., 119 N. W. 657.

97. **Licenses**—Ordinances.—An ordinance imposing a $100 license tax upon express companies held not unreasonable.—Hardee v. Brown, Fla., 47 So. 834.

98.——Vehicles.—Owner of wagons kept to rent to various firms under monthly contracts held not the owner of vehicles used for pay, nor is his compensation subject to control by the city council within a charter provision.—McCauley v. State, Neb., 119 N. W. 675.

99. **Life Estates**—Outstanding Title.—One claiming under a remainderman cannot claim benefits from a conveyance to the life tenant of an outstanding title without offering to contribute his proportionate part of the price paid for the conveyance.—Morrison v. Roehl, Mo., 114 S. W. 981.

100. **Marriage**—Effect of Illegality of First Marriage.—Where a man and woman, after being married once, have a second ceremony performed, the first marriage not being dissolved, the second marriage, though of no effect if the first was legal, will be effective if the first was void.—Knapp v. State, Tex., 114 S. W. 836.

101.——Invalid Marriage of Divorced Persons.—A woman married to a divorced man within the prohibited time after divorce, held not his common-law wife.—Severa v. National Slavonic Society of the United States, Wis., 119 N. W. 814.

102. **Master and Servant**—Duty to Observe Defects in Machinery.—A master is bound to find out changes resulting from the gradual wear of machinery, and repair them, and to warn the servant thereof.—Cochrell v. Langley Mfg. Co., Ga., 63 S. E. 244.

103. **Mechanics' Liens**—Contractor's Bond.—A materialman, who was entitled to a mechanic's lien, though he had never perfected it, could sue on a contractor's bond to the owner, which permitted any one to sue thereon who might become entitled to a lien under the contract.—Gwinn v. Wright, Ind., 86 N. E. 453.

104.——Extent of Land Affected.—Where labor and materials were expended on a building under a contract, a lien was acquired on the whole lot, though it was subsequently divided.—Davidson v. Stewart, Mass., 86 N. E. 779.

105.——Right to Lien.—Money advanced by a contractor to another contractor as a matter of favor will not be protected by a mechanic's lien.—Lunsford v. Wren, W. Va., 63 S. E. 308.

106. **Mortgages**—Fraudulent Representations.—A married woman is bound by a mortgage which she signs without reading, though the taker has made false statements, where he stands to her in no confidential relation.—J. C. Tracy & Co. v. Harris, Ga., 63 S. E. 233.

107.——Mortgagee in Possession.—One cannot become a mortgagee in possession, unless his entry is with the consent of the mortgagor, and such possession confers no title on the mortgagee.—Becker v. McCrea, N. Y., 86 N. E. 463.

108.——Sale and Assumption of Debt.—Though a subsequent purchaser assumes a mortgage debt absolutely in the deed of conveyance, the mortgagee cannot enforce the contract, where there was a different collateral contract between the purchaser and the mortgagor.—Klemmer v. Kerns, N. J., 71 Atl. 332.

109. **Municipal Corporations**—Assessment of Benefits and Damages.—A city board of public works in making an assessment of benefits and damages to abutting property resulting from street paving held bound to ascertain what the benefits and damages amounted to on each parcel of land, instead of assuming that the benefits were equal to the cost of doing the work.—Loewenbach v. City of Milwaukee, Wis., 119 N. W. 880.

110.——Defective Sidewalks.—One who in the dark attempts to pass along a sidewalk apparently intended for public use held not required to determine whether a platted street accepted by the city exists.—Dunn v. City of Oelwein,

111.——Ordinances.—Every act of a municipality through its ordinances should be within the powers expressly or impliedly conferred, and

should not violate any principle of law.—Hardee v. Brown, Fla., 47 So. 834.

112.——Use of Streets by Pedestrian.—A pedestrian has the right to use all parts of a street consistent with the legal uses to which it is devoted.—Trigg v. Water, Light & Transit Co., Mo., 114 S. W. 972.

113. **Negligence**—Questions for Jury.—Unless there is enough in the testimony to enable the court to say, as a matter of law, that plaintiff suing for a personal injury was guilty of contributory negligence, a non-suit should not be granted on that ground.—Grimm v. Milwaukee Electric Ry. & Light Co., Wis., 119 N. W. 833.

114. **Nuisance**—Offensive Trades.—An offensive trade or manufacture may require interference in equity on the ground that the same is a nuisance, for though necessary and lawful it should be exercised in a remote place.—McGill v. Pintsch Compressing Co., Iowa, 118 N. W. 786.

115. **Partition**—Vacating Sale.—A purchaser of property at a partition sale has such an interest as entitles him to be heard on a motion to set aside the sale.—Thomas v. Elliott, Mo., 114 S. W. 987.

116. **Partnership**—Accounting.—Partners advancing money to purchase lands for the partnership, title to which was taken in the name of another partner, held entitled, on a dissolution thereof, to have the lands sold to repay the advances.—Fouse v. Shelly, W. Va., 63 S. E. 208.

117.——Existence of Relation.—A partnership as to third persons may exist without any contract between the parties, and contrary to their intention.—Townley Bros. v. Crickenberger, W. Va., 63 S. E. 320.

118.——Right to Rescind Contract.—A partner who has received a stock of goods and disposed of them as his own, under an agreement of settlement of the partnership, could not rescind the agreement regardless of the assent of the other partner without tendering back the advantage he had received thereunder.—Fritz v. Fritz, Iowa, 118 N. W. 769.

119. **Pledges**—Bona Fide Holder.—Acquiescence by a creditor in the release of a joint debtor held not to afford a consideration to support a claim of the creditor that he was a bona fide holder of bonds transferred to him as collateral security by the continuing debtor.—Walker v. Harris' Ex'rs, Ky., 114 S. W. 775.

120. **Principal and Surety**—Discharge of Surety.—A provision in a building contract that changes may be made in the work, and that such changes, when agreed on, shall not release the sureties on the bond given to guaranty the contract, is valid.—Bartlett & Kling v. Illinois Surety Co., Iowa, 119 N. W. 729.

121. **Railroads**—Crossing Accidents.—A passenger train is bound to give reasonable warning of its approach to a highway crossing, not, as a matter of law, by whistle; but it may do so by any other proper method, as by ringing the bell, by gates, etc., though warning by whistle would be sufficient.—Brown v. Long Island R. Co., 113 N. Y. Supp. 1090.

122.——Service of Process.—For the purpose of serving process, a railroad corporation chartered by another state will be treated as a domestic corporation, and the return need not show that the place of service was the residence of the person served.—Stout v. Baltimore & O. R. Co., W. Va., 63 S. E. 317.

123. **Reference**—Right to Trial by Jury.—Plaintiff, in an action for breach of contract for services, could not be deprived of a jury trial because the counterclaim set up involved a matter which was otherwise properly referable.—Snell v. Niagara Paper Mills, N. Y., 86 N. E. 460.

124. **Reformation of Instruments**—Mutual Mistake.—To justify the reformation of an instrument on the ground of mistake, it is essential to show a mutual mistake, together with an enforceable contract of the tenor sought to be established.—Moehlenpah v. Mayhew, Wis., 119 N. W. 826.

125. **Release**—Fraud.—To justify the conclusion that statements by a surgeon in the employ of one liable for a personal injury to the injured person to induce a settlement were fraudulent, it is not sufficient that the opinion has been proved incorrect.—Nason v. Chicago, R. I. & P. Ry. Co., Iowa, 118 N. W. 751.

126. **Sales**—Mortgages.—Where an agreement for the sale of a press provided that title should remain in the seller until a mortgage for the purchase price was given, the acceptance of the press by the buyer would not pass title until such mortgage was given.—Anundson v. Standard Printing & Mfg. Co., Iowa, 118 N. W. 789.

127. **Slaves**—Legitimatizing Issue.—Act Feb. 14, 1866 (Laws 1865-66, p. 37, c. 556), legitimatizing the issue of slave marriages, did not require that the marriage be monogamous.—Lindsey's Devisee v. Smith, Ky., 114 S. W. 779.

128. **Specific Performance**—Oral Contract to Adopt Child.—An oral contract to adopt a child and will her property may be specifically enforced.—Peterson v. Bauer, Neb., 119 N. W. 764.

129. **States**—Primary Election Law.—A resolution providing for legislative investigation of the workings of the primary election law as applied to United States senators held not objectionable as an attempt to administer a void law.—State v. Frear, Wis., 119 N. W. 894.

130. **Street Railroads**—Care Required of Pedestrians.—One desiring to cross a street car track in advance of an approaching car may do so, if, calculating reasonably from the standpoint of a person of ordinary care, he has sufficient time to pass without interfering with the movement of the car.—Grimm v. Milwaukee Electric Ry. & Light Co., Wis., 119 N. W. 833.

131.——Contributory Negligence.—A child between eight and nine years of age, who attempts to cross the street ahead of an approaching train of street cars, held guilty of contributory negligence.—Downey v. Baton Rouge Electric & Gas Co., La., 47 So. 837.

132.——Res Ipsa Loquitur.—The rule res ipsa loquitur held to apply where plaintiff was injured by a bolt which was seen to fall from defendant's elevated railroad structure while its train was passing over it.—Sturza v. Interborough Rapid Transit Co., 113 N. Y. Supp. 974.

133. **Taxation**—Void Tax Sale.—Where a person held state school lands under a void tax sale, and, believing he had title, made improvements and paid taxes thereon, he was entitled to reimbursement on recovery of the land by the true owner.—Edwards v Butler, Miss., 47 So. 801.

134. **Telegraphs and Telephones**—Damages for Failure to Deliver.—Telegram held not on its face to disclose that personal or other suffering would be the natural result of negligence in its delivery.—Hildreth v. Western Union Telegraph Co., Fla., 47 So. 820.

135. **Tenancy in Common**—Confidential Relations.—Tenants in common sustain a confidential relation to each other in the nature of a trust, and may not assume hostile attitudes as between themselves, but are bound to protect the common interest.—Smith v. Smith, N. C., 63 S. E. 177.

136. **Vendor and Purchaser**—Performance of Contract.—Where part of the price of land has been paid, the vendor cannot bring unlawful detainer until he has tendered a deed.—Bowling v. Bowling, Miss., 47 So. 802.

137. **Weapons**—What Constitutes.—To call a toy a pistol does not make it so, or to call a pistol a toy does not make it a toy, within Pen. Code, 1895, sec. 344, forbidding the sale of a pistol to a minor.—Mathews v. Caldwell, Ga., 63 S. E. 250.

138. **Witnesses**—Privileged Communications.—An attorney connected with a transaction originating in his office is not privileged to avoid being examined to ascertain the name and address of a necessary party to an action in order to serve process.—Schwarz v. Robinson, 113 N. Y. Supp. 995.